

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HERBERT DWAYNE PEMBERTON**

## Claimant

VS.

**CROSSLAND CONSTRUCTION CO.**

Respondent

AND

CGU HAWKEYE-SECURITY INSURANCE CO.

Insurance Carrier

Docket No. 264,313

## ORDER

Claimant appealed the January 9, 2002 Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

## ISSUES

This is a claim for a July 18, 2000 accident. After conducting a preliminary hearing and reviewing deposition testimony from both claimant and respondent's Dustin Sheridan, Judge Foerschler determined that on the date of accident claimant was working for respondent as an independent contractor rather than an employee. Accordingly, the Judge denied claimant's request for workers compensation benefits. The Judge did not address the issue of timely written claim, which the respondent and its insurance carrier raised at the preliminary hearing.

The question whether claimant was an employee of respondent on the date of accident is the only issue on this appeal. Claimant argues on the date of accident he was an employee of respondent for purposes of the Workers Compensation Act. According to claimant, respondent had the right to control his work activities, respondent provided all the materials for claimant's work, respondent provided some of the tools used by claimant, respondent provided two of its employees to assist claimant, and respondent had the right to terminate claimant's employment.

Claimant also alleges that respondent's construction superintendent told him that he would have workers compensation insurance coverage through respondent. Accordingly, claimant requests the Board to reverse the preliminary hearing order and award him benefits.

Conversely, respondent and its insurance carrier contend claimant was working for respondent as an independent contractor at the time of the accident. They argue respondent hired claimant, who owns and operates an excavating company, as a subcontractor. They contend claimant represented that his company had workers compensation insurance. They deny that respondent ever represented to claimant that it would provide him workers compensation insurance coverage. Moreover, it is respondent's policy to discharge any independent contractor who does not have that insurance coverage. Respondent and its insurance carrier argue that claimant provided his own equipment, claimant was paid on the basis of invoices submitted after completing a task, no taxes were withheld from the monies respondent paid to claimant and respondent's control over claimant was limited to the end product of the work.

Accordingly, respondent and its insurance carrier request the Board to affirm the January 9, 2002 Preliminary Decision denying claimant's request for benefits.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. After reviewing the record compiled to date, as well as the arguments and authorities set forth in the parties' briefs, the Board finds and concludes that the January 9, 2002 Preliminary Decision should be affirmed.
2. On July 18, 2000, claimant suffered severe injuries when a concrete saw kicked back and cut his face. At the time of the accident, claimant was performing work at a school being constructed by respondent.
3. Respondent first hired claimant in the fall of 1999 to break concrete off of a loading dock with a hoe ram and a backhoe. Claimant was hired for that job after submitting a bid and presenting proof of workers compensation insurance. The job lasted approximately one to three weeks.
4. Respondent again hired claimant in June 2000 to pour sidewalks and road entrances at the school. In some areas, claimant removed and replaced existing concrete. Before being hired on that occasion, claimant analyzed the job and quoted respondent a price per square foot for doing the concrete work and an hourly price for the work performed using claimant's backhoe and other excavating equipment. Respondent agreed to the prices quoted and hired claimant to do the work. Claimant was working on that project at the time of the July 18, 2000 accident.

5. After the accident, claimant learned the workers compensation insurance coverage that he had purchased for his excavating business had expired in March 2000 and, therefore, neither he nor his company had workers compensation insurance coverage for the July 2000 accident.

6. It is often difficult to determine in a given case whether a person is an employee or independent contractor because the employer-employee and principal-independent contractor relationships share similar elements.<sup>1</sup>

7. There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>2</sup> The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>3</sup>

8. The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee along with the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to control that renders one a servant rather than an independent contractor.<sup>4</sup>

9. Moreover, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.<sup>5</sup>

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<sup>1</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>2</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>3</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>4</sup> *Wallis*, at 102 and 103.

<sup>5</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

10. Based upon the following facts, among others, the Board concludes that claimant was working for respondent as an independent contractor at the time of the July 2000 accident:

- i. For approximately five years before the accident, claimant and his wife owned and operated an excavating business, contracting the company to perform work for a number of other companies besides respondent;
- ii. Claimant obtained the loading dock and concrete work that he performed for respondent after analyzing the work required and quoting prices for that work;
- iii. Contrary to claimant's contentions that respondent strictly controlled claimant's work activities doing the concrete work, respondent exercised only limited supervision over that work;
- iv. Claimant's company performed concrete work as part of the services it offered;
- v. Claimant provided the backhoe, end loader, dump truck and some of the hand tools and saws used to perform the concrete job;
- vi. Claimant performed work for respondent on a piece work basis;
- vii. At the time of the accident, claimant had at least two part-time employees working for him whom he paid on an hourly basis;
- viii. Claimant was paid every 30 to 60 days as work was completed and invoiced;
- ix. The parties intended that claimant would be treated as an independent contractor as evidenced by the fact that respondent did not withhold any taxes from the money it paid to claimant.

11. Due to the conclusion that claimant was an independent contractor rather than an employee at the time of the accident, the issue of timely written claim is moot.

12. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>6</sup>

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<sup>6</sup> K.S.A. 44-534a(a)(2).

13. The Board adopts the findings and conclusions set forth in the Preliminary Decision.

**WHEREFORE**, the Board affirms the January 9, 2002 Preliminary Decision entered by Judge Foerschler.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2002.

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BOARD MEMBER

c: Anthony M. Totta, Attorney for Claimant  
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director